Supreme Court, U.S.
FILED
APR 0 6 2007
OFFICE OF THE CLERK

(2)

No. 06-1039

In the Supreme Court of the United States

THE ESTATE OF ROGER ROXAS
AND GOLDEN BUDHA CORPORATION,

Petitioners,

v.

MARIANA J. PIMENTEL, on behalf of himself and all other persons similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.

STEPHEN V. BOMSE
Counsel of Record
RACHEL M. JONES
ADAM J. GROMFIN
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Counsel for Respondents Republic of the Philippines and Philippine Presidential Commission on Good Government

KENNETH S. GELLER
CHARLES A. ROTHFELD
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents Philippine National Bank and Arelma Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Ninth Circuit should have entertained an interpleader action initiated to settle ownership of assets stolen by Ferdinand Marcos while he was President of the Republic of the Philippines.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondents state that the Philippine National Bank (PNB) is a publicly traded corporation, in which the Republic of the Philippines has a minority ownership interest. PNB has no parent corporation and no publicly held company owns 10% or more of its stock. Arelma, S.A., which has been incorrectly referred to as Arelma Inc. throughout this litigation, is a Panamanian corporation whose shares are held in escrow by PNB. The Republic of the Philippines and the Philippine Presidential Commission on Good Government, as governmental entities, are exempt from Rule 29.6.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

U.S. CASES

Credit Suisse v. *United States District Court*, 130 F.3d 1342 (9th Cir. 1997) 6

In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539 (9th Cir. 1996) 5

Hilao v. *Estate of Marcos*, 95 F.3d 848 (9th Cir. 1996) 5

Hilao v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) 2

In re Philippine National Bank, 397 F.3d 768 (9th Cir. 2005) 6

Roxas v. *Marcos*, 109 Hawai'i 83 (2005) 6

STATUTES AND RULES

Fed. R. Civ. P. 19(b) 6, 8

FOREIGN CASES

In re Aguamina Corp., No. 1A.31 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998) 2

Fed. Office for Police Affairs v. *Fondation Maler, Arelma, Inc. et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997) 2, 3

Fed. Police Dept. v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997) 2

Republic of the Phil. v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003) 3

Republic of the Philippines v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998) 2

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

Robert L. Stern *et al.*, SUPREME COURT PRACTICE 390-391 (8th ed. 2002) 1

STATEMENT

The Republic of the Philippines, the Philippine Presidential Commission on Good Government ("PCGG"), the Philippine National Bank ("PNB"), and Arelma, Inc., are claimants to the assets at issue in this interpleader action and are subject to the Ninth Circuit judgment challenged by petitioners Estate of Roger Roxas and Golden Budha Corporation (collectively "Roxas").[1] The Republic, the PCGG, PNB, and Arelma have filed their own joint petition for certiorari, raising a different set of challenges to that judgment. No. 06-1204, *Republic of the Philippines* v. *Pimentel*. Pursuant to Rule 12.6 of the Rules of this Court, they file this brief as respondents in opposition to the Roxas petition. See Robert L. Stern *et al.*, SUPREME COURT PRACTICE 390-391 (8th ed. 2002).

1. The petition in this case grows out of a dispute over ownership of a subset of the assets that were stolen by Ferdinand Marcos while he was President of the Republic of the Philippines – the so-called "Arelma assets," which are shares of a Panamanian shell corporation created by Marcos that controlled a trading account at Merrill Lynch, Pierce, Fenner, & Smith.[2] The petitioners here, the estate of Roger Roxas and the Golden Budha Corporation, contend that Marcos stole the funds used to capitalize Arelma from them. The Republic and the PCGG maintain that the assets Marcos used to create Arelma were public funds that at all times have been owned by the Republic. A third group of claimants is a class of Philippine victims of the Marcos dictatorship (the "Pimentel class"), which won a near-$2 billion judgment against the Marcos estate in the United States District Court for the Dis-

[1] The Golden Budha corporation carries a misspelled name "for reasons connected with the warrants issued to Roxas." No. 06-1204, Pet. App. 23a.

[2] As explained below, the shares of Arelma have been transferred to an escrow account at PNB, which now controls the corporation.

trict of Hawaii. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). In contrast to the Republic and Roxas, the Pimentel class does not assert that it has any special ownership interest in the assets used to create Arelma; instead, the class stakes its claim as a general creditor of the Marcos estate.

As the Republic and PNB explain in more detail in their petition for certiorari (at 2-3), the recovery of assets stolen by Marcos – many of which had been secreted in Switzerland – is a matter of the greatest urgency to the Republic. In 1986, Swiss authorities, responding to a request from the Philippine government, froze Marcos-related assets in Switzerland, including the shares of Arelma. Because there was no doubt about the illegal provenance of these assets, in 1995 Swiss authorities acceded to the Republic's request that the assets be transferred to PNB, to be held in escrow pending final determination of ownership by the Philippine courts. When the transfers were challenged by the entities controlling the assets, including Arelma, the Swiss Supreme Court affirmed. See *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc, et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997); *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998); *In re Aguamina Corp.*, No. 1A.31, 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998); *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997).

The Swiss court authorized the transfer on the express condition that "[t]he Republic of the Philippines guarantee to decide about the seizure or restitution of the assets to the entitled parties, respectively, in judicial proceedings which satisfy [certain] procedural principles." *Fed. Office*, *supra*, at 10. The court added that this determination "must be taken in the Philippines where the criminal actions were committed." *Republic of the Phil.*, *supra*, at 217. In reaching this conclusion, the Swiss court specifically addressed the claims of the Pimentel class, holding that the Pimentel claimants were not

entitled to attach assets held by Marcos in Switzerland. Instead, the Swiss court determined that "the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings [in the Philippines] if they want to assert Ferdinand Marcos' personal responsibility for the human rights violations committed during his tenure, or they have to claim damages from the Philippine government for the wrongs committed by its organs." *Fed. Office*, *supra*, at 28.

2. For more than fifteen years, the Republic and the PCGG have been seeking to settle ownership of the Marcos-related Swiss assets through forfeiture proceedings litigated against the Marcos estate in the Sandiganbayan, the Philippine anti-corruption court, and the Philippine Supreme Court. These proceedings are consistent with the orders of the Swiss Supreme Court. In 2003, the Philippine Supreme Court ruled for the Republic and the PCGG, holding that the Swiss assets belong to the Philippine government. *Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003). Denying a motion for rehearing by the Marcos estate and heirs, the court emphasized:

> Petitioner Republic has a right to a speedy disposition of this case. It would be readily apparent to a reasonable mind that respondent Marcoses have been deliberately resorting to every procedural device to delay the resolution hereof. There is justice waiting to be done. The people and the State are entitled to a favorable judgment, free from vexatious, capricious, and oppressive delays, the salutary objective being to restore the ownership of the Swiss deposits to the rightful owner, the Republic of the Philippines, within the shortest possible time.

Rep. of the Phil. v. Honorable Sandiganbayan, G.R. No. 152154 (Phil. Nov. 18, 2003), at 10.

When the PCGG initially brought its forfeiture action

before the Sandiganbayan, it specifically listed Arelma and the Merrill Lynch account as the product of illegal activity that have at all times belonged to the Philippine government. ER0106, 0174-0251.[3] Although the Philippine Supreme Court's decision in the forfeiture proceeding unequivocally favored the Republic's legal claim regarding all of Marcos's Swiss property, it did not expressly mention the Arelma assets. The PCGG therefore filed a motion before the Sandiganbayan seeking a clarification that the Arelma assets indeed were forfeit to the Republic. That litigation, which will conclusively determine ownership of the Arelma assets as a matter of Philippine law, is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court.

3. In 2000, after the Swiss Supreme Court confirmed the transfer of Marcos' Swiss assets to the Philippines, the Republic asked Merrill Lynch to send the Arelma account to PNB, to be held in escrow pending a determination of ownership by the Philippine courts. Because a representative of the Marcos family also asserted entitlement to the assets at that time, Merrill Lynch declined the request, stating that it "would prefer to await an adjudication of ownership of the Arelma shares by the Philippine courts which is final and binding on the parties with conflicting claims, and to consider the request for release based on corporate action and instructions given thereafter." ER0393-0395.

At the same time, however, the Pimentel class, which was seeking to satisfy its $2 billion judgment against the Marcos estate, also claimed the assets as judgment creditors of the estate. In response to that claim, Judge Manuel Real, the district judge who had presided over the Pimentel class litigation in Hawaii, directed Merrill Lynch t appear before

[3] ER refers to excerpts of record filed in the Ninth Circuit by the Republic and the PCGG in No. 04-16401, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Republic of the Philippines*.

him. ER0388-0391. Although the Arelma account and assets had no connection with Hawaii, Judge Real – in an *ex parte*, sealed proceeding – directed Merrill Lynch to commence an interpleader action there to settle ownership of the Arelma assets. ER0031-0032. The action originally named as defendants, among others, the Republic, the PCGG, PNB, Roxas, and the Pimentel class. No. 06-1204, Pet. App. 31a. At the Ninth Circuit's direction, Judge Real dismissed the Republic and the PCGG from the interpleader suit on sovereign immunity grounds.[4] But in their absence, he proceeded to award the Arelma assets to the Pimentel class in their entirety. *Id.* at 43a-54a.

That was not the first procedural oddity in Hawaii federal court relating to litigation about the Marcos assets. Judge Real initially ruled that the Republic was an "aider and abettor" of the Marcos estate and purported to enjoin the Republic from transferring any of the estate's assets; the Ninth Circuit set aside that ruling as inconsistent with the Republic's sovereign immunity. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 548 (9th Cir. 1996). Judge Real then ordered two Swiss banks to transfer to the registry of the Hawaii district court assets that had been frozen by the Swiss government, and to commence an interpleader action in Hawaii to settle ownership of those assets; after the Swiss government protested and the United States filed as an *amicus* to challenge the validity of the order, the Ninth Circuit reversed, holding that there was no authority for the district court's ruling. *Hilao* v. *Estate of Marcos*, 95 F.3d 848, 853-54 (9th Cir. 1996). Following Judge Real's further refusal to dismiss an action brought by the Pimentel class seeking to enjoin the Swiss banks from transferring the assets ex-

[4] Judge Real had first ruled against the Republic and the PCGG on the merits. The Ninth Circuit set aside that judgment, holding that the Republic and the PCGG had sovereign immunity and that entitlement to immunity had to be resolved prior to any consideration of the merits. No. 06-1204, Pet. App. 30a-42a.

cept at the direction of the Hawaii district court, the Ninth Circuit ruled that the suit had to be dismissed on act-of-state grounds. *Credit Suisse* v. *United States District Court*, 130 F.3d 1342, 1347-48 (9th Cir. 1997). And after Judge Real threatened to hold PNB in contempt for complying with an order of the Philippine Supreme Court regarding disposition of certain Marcos-related assets, the Ninth Circuit again reversed under the act-of-state doctrine. *In re Philippine National Bank*, 397 F.3d 768, 772-75 (9th Cir. 2005).

In the proceeding now before the Court, however, the Ninth Circuit affirmed the district court's award of the Arelma assets to the Pimentel class. As the Republic and PNB explain in more detail in their pending petition (at 7-10), the Ninth Circuit rejected the argument that the Republic and the PCGG – which have asserted their sovereign immunity and therefore did not participate in the district court proceedings – are indispensable parties under Fed. R. Civ. P. 19(b), in whose absence the action may not proceed. The court of appeals reasoned that the sovereign immunity of the Republic and the PCGG did not require dismissal of the action because, in the court's view, they would not prevail on the merits if they litigated their entitlement to the Arelma assets. No. 06-1204, Pet. App. 7a-8a. The court also believed that Rule 19(b) directs judges to "achieve fairness." *Id.* at 6a. In trying to advance the equities here, the court placed considerable weight on "the symbolic significance of some tangible recovery" for the Pimentel class (*id.* at 9a), criticizing the Philippine government for not taking what the court regarded as adequate "steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was President of the Republic." *Id.* at 9a-10a.

As for Roxas, the Ninth Circuit in its initial decision stated:

> Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of

> damages that has been affirmed on appeal. *Roxas v. Marcos*, 109 Hawai'i 83 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that [his] assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

No. 06-1204, Pet. App. 27a-28a.

On rehearing, the panel modified its opinion regarding Roxas. Upholding the district court's exclusion of evidence bearing on Roxas's claim that the assets used to fund Arelma had been stolen from him (No. 06-1204, Pet. App. 10a-11a), the Ninth Circuit "agree[d] with the district court that the record does not support a finding that the Arelma assets were stolen from him." *Id.* at 11a. The court of appeals added that Roxas's tort judgment "is against Imelda Marcos personally" and "does not bind the Marcos estate." *Ibid.* Without explanation, the court omitted the language from its prior opinion suggesting that, if the Arelma account could be traced to Roxas's assets, Roxas nevertheless would be entitled to recover no more than an individual member of the Pimentel class.

REASONS FOR DENYING THE PETITION

The Roxas petition should be denied. In rejecting Roxas's challenge to the district court's decision, the Ninth Circuit held only that his claim regarding the origin of the Arelma assets was unsupported by the record, that he does not have a judgment against the Marcos estate, and that he accordingly "has no claim to be satisfied here." No. 06-1204, Pet. App. 11a. The court of appeals simply did not expressly address Roxas's remaining arguments, which he now raises in his petition for certiorari. There accordingly is no clear

holding by the Ninth Circuit that conflicts with decisions of other courts of appeals or of this Court. That makes further review inappropriate.[5]

In two respects, however, the proceedings relating to Roxas confirm that the Court should *grant* the pending petition for certiorari filed by the Republic, the PCGG, PNB, and Arelma. *First*, the Ninth Circuit's treatment of the Roxas claim highlights that court's willingness to disregard procedural rules in the interest of advancing a purely subjective and legally unconstrained concept of "fairness." In its haste to rule for the Pimentel class, the court of appeals wholly ignored virtually all of the legal contentions advanced by Roxas in his appeal. The court's initial opinion, moreover, held that, if Roxas's factual claims were correct, he nevertheless would be entitled to recover no more than any individual member of the Pimentel class – even though Roxas is *not* a member of that class and his claim rests, not on tort injury inflicted by Marcos (as does the Pimentel class claim), but on the assertion that *all* of the assets at issue were stolen from him. The court offered no support at all for this bizarre holding. The Ninth Circuit was similarly cavalier in its rejection of the more substantial arguments advanced by the Republic and PNB, wholly ignoring both the legal constraints set by Rule 19(b) and sovereign immunity principles in a rough attempt to implement its seat-of-the-pants concept of fairness. See No. 06-1204, Pet. 13-30.

Second, and more fundamentally, the Roxas claim illustrates the importance of allowing the Philippine courts to resolve disputes about ownership of Marcos-related assets. The parties to this proceeding all agree that the Arelma assets

---

[5] Of course, if the Court grants the petition filed by the Republic and PNB and sets aside the Ninth Circuit's decision on the ground that the Republic and the PCGG are indispensable parties, Roxas will be free to litigate his claim to the Arelma assets in the Philippine courts.

were stolen by Marcos *in the Philippines* while he was serving as President of the Republic. The injuries caused by Marcos for which the claimants in this proceeding seek recovery all were inflicted *in the Philippines*. The individual claimants are virtually all citizens *of the Philippines*. And the Republic is seeking the recovery of assets that were stolen from, and at all times have belonged to, *the people of the Philippines*.

Moreover, the claims of the Republic are legally precedent to those of other claimants to the Arelma assets: under Philippine law, assets misappropriated by Marcos while he was serving as President have at all times been owned by the Republic and never entered the Marcos estate. See No. 06-1204, Pet. 2. As a consequence, plaintiffs who assert claims to particular assets as creditors of the Marcos estate (like the Pimentel class) must await a determination that those assets in fact belong to the estate. So far as the Arelma assets are concerned, that question will be settled by litigation that is currently pending in the Philippine courts. This Court accordingly should grant the petition of the Republic and PNB to set aside the Ninth Circuit's decision, which effectively pretermits long-running Philippine litigation between the Republic and the estate of its former President.

CONCLUSION

The Court should deny the Roxas petition and grant the petition in No. 06-1204, *Republic of the Philippines* v. *Pimentel*.

Respectfully submitted.

STEPHEN V. BOMSE
Counsel of Record
RACHEL M. JONES
ADAM J. GROMFIN
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Counsel for Respondents Republic of the Philippines and Philippine Presidential Commission on Good Government

KENNETH S. GELLER
CHARLES A. ROTHFELD
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents Philippine National Bank and Arelma Inc.

APRIL 2007